FILED
NOV 9 1945

No. 596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ARDEN DIETRICH BODE, ALFRED EARNEST PARTRIDGE, JOHN KAYSER NEUBRAND, MORRIS HOROWITZ, GEORGE KIYOSHI YAMADA, JASON JEROME HOPKINS AND RODNEY CLAUD OWEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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The Schaffer Press, Inc. DEL. 7171

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners Arden Dietrich Bode, Alfred Earnest Partridge, John Kayser Neubrand, Morris Horowitz, George Kiyoshi Yamada, Jason Jerome Hopkins and Rodney Claud Owen, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Cir-

cuit to review the decision of that Court made on the 9th day of October, 1945, affirming judgment of the District Court of the United States for the Western District of Michigan, Southern Division, of March 28, 1945, overruling defendants' Demurrer to the indictment and denying their Motion to Dismiss, and finding them guilty of violating the Selective Training and Service Act of 1940, as amended, (54 Stat. 885, 50 U.S.C. App. Par. 301, *et seq.*)

Statement of Matters Involved.

Individual indictments were returned against each of the petitioners before the District Court of the United States, Western District of Michigan, Southern Division, (Tr. 1-2) charging that the Petitioners and each of them were,

> "lawfully assigned to Civilian Public Service Camp No. 135 at Germfask, Michigan, to do work of national importance and was duly enrolled as a member of said camp. . . . did knowingly, wilfully, and feloniously fail and neglect to abide by the rules and regulations prescribed and established by the Director of Selective Service for the conduct of registrants assigned to civilian work of national importance . . . in that he, without authority, did absent himself from said camp from . . . to and including the date hereof . . ."

Each of the indictments refers particularly to Section 653.12 of the Selective Service Regulations, (50 App. U.S.C.A. 311 (Tr. 2).)

Petitioners and each of them filed a Demurrer to the indictment and filed a Motion to Dismiss (Tr. 2 and 4), and therein each and everyone of them contended that:

(1) The administrative regulations of Selective Service, the violation of which is charged against the petitioners, are contrary to the intent of Congress, and are not

within the powers delegated to the President by the Selective Training and Service Act of 1940;

(2) The Regulations of Selective Service concerning the establishment and operation of camps for conscientious objectors, which Regulations are issued pursuant to powers delegated by the President, are in excess of the powers first delegated to the President by the Congress of the United States;

(3) Congress has no power within the Constitution to draft petitioners, who are civilians, for labor that is non-defense and non-military in character. In consequence, the Regulations of Selective Service assigning petitioners to work of non-defense and non-military character are contrary to the Constitution;

(4) The Selective Service Regulations, the violation of which is charged against petitioners, are discriminatory in disfavor of petitioners who as conscientious objectors were made exempt from military service. While groups and classes other than conscientious objectors are exempt from military service, such other exempt groups are not constrained to live under and abide by the regulations similar to those applied to the exempt group of conscientious objectors.

The discrimination thus practiced upon petitioners as conscientious objectors is

(a) contrary to the Fifth Amendment to the Constitution

(b) contrary to the First Amendment guaranteeing religious freedom, and

(c) contrary to the Thirteenth Amendment providing against involuntary servitude.

(5) Executive Order No. 8675 of February 6, 1941, and subsequent orders thereunder which brought about the establishment of the camp to which petitioners were assigned, and the rules of Selective Service pertaining to the operation of the camp are void because they are without the power delegated by Congress in Section 5(g) of the Selective Service Act of 1940.

(6) Section 5(g) of the Selective Service Act of 1940 is void because it is incomplete, vague, and because it is silent as to directives which cannot be left for the determination and discretion of the Director of Selective Service, an administrative agent; this with particular reference to the work assignment of petitioners which is designated, at the discretion of the Director of Selective Service, as "work of national importance."

It was stipulated by the petitioners and the Government, with the approval of the Trial Court, that a plea of *nolo contendere* will be submitted to and be accepted by the Court with the express understanding and reservation that first consideration will be given to the Demurrers and the Motions to Dismiss (Tr. 6).

It was also stipulated that certain evidential facts may be submitted to the Court in support of the Demurrers and Motions to Dismiss. Such evidence was then received by the Court in part by oral testimony of petitioners, and in part by documents (Tr. 7, 25, 39 and 40-87).

The Trial Court, having heard argument in support and in opposition of the Demurrers and Motions to Dismiss, took the matter under advisement, and by its Order of March 28, 1945 (Tr. 87-90) overruled the Demurrers and denied the Motions to Dismiss, and entered a finding of guilty, and, subsequently, on the 2d day of April, 1945, the

petitioners and each of them were sentenced in the custody of the Attorney General for a term of three years and six months (Tr. 91).

The evidence submitted in support of petitioners' Demurrers and Motions to Dismiss discloses that;

Arden Dietrich Bode is twenty-one (21) years old, born in Rochester, New York, whose father at that time was a minister in the Evangelical Church in that city. Later, the father took charge of an orphan's home in New York City, as superintendent, in which institution the petitioner's mother was acting as matron. At the time of the trial, petitioner's father was minister of the Evangelical Church in a farm community near New Knoxville, Ohio where the mother is actively engaged. She is also a poetess and a lecturer.

Petitioner, himself, attended grammar school in New York City, high school in Philadelphia, and two years at the Heidelberg College at Tiffin, Ohio, his interest centering in Social Science and Philosophy. During summer vacations he was counsellor in a boys' camp. He also worked on farms and in settlement houses working with younger children (Tr. 34-35).

Alfred Earnest Partridge is thirty (30) years old, born in Sivas, Turkey, whose parents both at that time were engaged in missionary work. Later, petitioner's parents worked with the Near East Relief; the father being the Director of Education for the Near East Relief in Russia, while the mother was superintendent of schools. The father was also president of the Sivas Teacher's College, and was director of the institution providing for twenty-five thousand orphans through the Near East Relief. Still later the father was in Beirut, Syria, engaged in education of refugees.

Petitioner obtained his first education from his mother. Later he went to the International College at Smyrna, Turkey, and then he came to the United States and entered Oberlin College, graduating from that school with a B.A. degree. He went to Emerson College on a teaching fellowship. Later he studied at the University of Michigan as a teaching fellow and received his Master of Arts degree. He was studying and teaching in Tulane University in New Orleans, and then returned to the University of Michigan to take his Doctor of Philosophy degree, but before he completed his studies, he was drafted and, being classified as a conscientious objector, was sent to the Civilian Public Service Camp No. 135 at Germfask, Michigan.

Petitioner, while at various institutions, worked in social settlement houses as a teacher for delinquent boys, and also as a playground instructor for a children's home. Just shortly before his trial, he was working in Chicago with the Prisoners' Aid Organization, which organization is helping ex-prisoners to re-adjust themselves to life following the completion of their sentence.

Petitioner is married and has a child six and a half months old. His wife, while petitioner was confined to the camp, was attempting to work to support both herself and the child; however, because of a recurring illness, she was forced to stop working (Tr. 25-28).

Petitioner John Kayser Neubrand is twenty-nine (29) years old, born in Pittsburgh, Pennsylvania, whose father suffered a stroke some twelve years ago and who is a complete invalid to the extent that he must be fed and bathed. Petitioner's mother is working to take care of her family and of the family of petitioner consisting of his wife and one child. Petitioner studied at the University of Pittsburgh, and took special courses at Carnegie Institute of

Technology. He was employed for about seven and a half years, following his studies, in the Mellon National Bank in Pittsburgh. He also did work at the Kingsley Settlement House (Tr. 28-30).

Petitioner Morris Horowitz is thirty (30) years of age, born in Brooklyn, New York. He attended college in the city of New York, receiving a Bachelor degree in Sociology. Later he attended the George Washington University Law school. While at the latter institution, he was working for the Bureau of Internal Revenue as a supervisor in their Claims Control Section work, of Social Security claims (Tr. 36-37).

Petitioner George Kiyoshi Yamada is twenty-six (26) years old, and was born in Minatare, Nebraska. His father is a farmer. Petitioner went to elementary and high school in Nebraska, and college in San Francisco. He started out in journalism and majored in social sciences. Later he was specializing in social sciences in the religious field. He enrolled in the Divinity school of the University of Chicago, known as the Chicago Theological Seminary. While working his way through school he was employed in the Billings Hospital and the Presbyterian Bookstore in Chicago. The schooling requirements provide for an additional year of study after which he intends to enter graduate school working towards a Ph. D. degree in the Divinity school (Tr. 37-39).

Petitioner Jason Jerome Hopkins is twenty-four (24) years old, and born in Brooklyn, New York. He went to Lawrence High School in Falmouth, Massachusetts. He was working for the War Resistors League in New York City; with the War Prisoners' Aid of the Y.M.C.A. of New York, and also in the Lawson Y.M.C.A. in Chicago. He offered his services as an ambulance driver with the Ameri-

can Field Service, to go to the war fronts. His offer was accepted, but he couldn't follow it up because of his arrest and subsequent conviction (Tr. 33-34).

Petitioner Rodney Claud Owen is thirty (30) years old, born in Trenton, Michigan. He graduated from the high school of that town, attended the Michigan State Normal College, and later the Michigan State College; and still later, graduated from the University of Michigan with a degree of Bachelor of Science in Electrical Engineering. He worked as an engineer for the Eureka Vacuum Cleaner Company, and then with the California Institute of Technology as an electronic technician. He was offered a position on the engineering staff of a company in their research laboratory. This company manufactures switches, circuit breakers, and panel equipment, and other articles in electrical engineering line. He was unable to take the proferred employment because of his trial and subsequent conviction (Tr. 30-32).

Among the documentary evidence introduced on behalf of petitioners, there is Exhibit No. 10 dated March 13, 1945, and called "Work Program for Two Year Period" of the Civilian Public Service Camp at Germfask to which petitioners were assigned and from which, as the indictment charges, they absented themselves for a period prior to their indictment (Tr. 74). This work program provides under the heading "Jobs" for the following work to be assigned to the inmates of the camp, and among them these petitioners:

> "Camp Overhead, Fighting Forest fires, Fire breaks, Fire Hazard Reduction-other, Fire presuppression, Truck Trails, Fences (sash and barbed wire), Bridges, Rip-Rap, Equipment repair, Signs, markers, Clearing Pond Sites and Reservoirs, Razing undesirable buildings, Food and cover planting, Seeding and Sodding, and Marking Boundaries."

Petitioners in support of their Demurrers and Motions to Dismiss argued that the regulations under which they were confined to a Civilian Public Service Camp are unconstitutional, and they particularly argued that the work assignment, even though designated by the Director of Selective Service as "work of national importance," cannot be considered so. Petitioners also argued that their assignment to the work to be performed at the camp, in face of their qualifications and considering the national emergency then existing, cannot be considered work of national importance, and thus Selective Service violated not only the letter of the law under which the camps were set up, but violated Congressional intent at the same time.

Petitioners consolidated appeal from their convictions was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit without an opinion (Tr. 100).

Jurisdiction.

Jurisdiction of this Court is invoked under Paragraph 240 of the Judicial Code (28 U.S.C. Par. 347).

Questions Presented.

Did the Courts below err in holding against petitioners' contention that the Director of Selective Service is not authorized either under the Selective Training and Service Act of 1940 nor under the Constitution to arbitrarily designate certain work to be of national importance, and compel petitioners to perform inconsequential work while trained and able to do superior work in the national interest?

If the courts below were correct in holding that the Director of Selective Service has the discretion under the Selective Service Training and Service Act of 1940 to des-

ignate whatever work he desires to be of national importance, then did the courts below err in not holding that the Act itself is unconstitutional because it is incomplete and silent as to directives which cannot be left for determination by an administrative agent?

Statutes Involved.

Paragraph 305 of the Selective Training and Service Act of 1940 (50 U.S.C. App. Par. 301, *et seq.*) provides under sub-paragraph (g) that

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

Reasons for Allowance of Writ of Certiorari.

As it appears from the Transcript of Record as a whole, and from the citations given therefrom above, each and everyone of the petitioners is well qualified to perform work in his respective and chosen field. As it is apparent from the Transcript of the Record, and particularly from the job classifications contained in Exhibit No. 10, the Civilian Public Service Camp to which petitioners were assigned required of them the performance of menial tasks exclusively. Among the tasks assigned and to be assigned

to the inmates, and among them these petitioners, was the preparation of "truck trails," the "erection of fences" both "sash" and "barbed wire," the making of "Rip-Rap" of "signs" and "markers" of "clearing of pond sites and reservoirs," of "marking boundaries," "seeding," and "sodding," and similar work usually performed with the help of unskilled, common labor.

Petitioners contended, and now do so again, that when Congress directed that they, as conscientious objectors be exempted from military service, and in lieu are to be assigned to work of national importance, it was intended that the work be truly of national importance. The national emergency that was expected at the time when the law was enacted, and the emergency that broke upon this nation, did not permit the luxury of using qualified and high-skilled persons to waste their time on work which either well could be dispensed with or which could be performed by others who do not have the skill of petitioners. It is contended that the Director of Selective Service could not, within the confines of the law under which he was operating, arbitrarily designate any work to be of national importance, but rather that he had certain directives before him which were to be followed. It would be contrary to common sense to assume that in wartime, or for that matter in peace, the Director wuld be empowered to follow his whim; that he is empowered to depart from the commonly accepted definitions, or that he is permitted to pervert the commonly-assumed content of the words when designating what is or what is not work of national importance.

Petitioners know that the Courts disclaimed jurisdiction to inquire into the propriety of a determination made by the Director of Selective Service as to the nature of the work that is designated by him to be work of national im-

portance. However, petitioners submit on the basis of two recent decisions of the United States Circuit Court of Appeals for the Sixth Circuit that the courts have jurisdiction to determine, from the point of view of the national interest, whether or not petitioners were assigned in fact to perform work of national importance. The National Labor Relations Board, in the cases *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 146 Fed. (2d) 718, (Rehearing Denied; 146 Fed. (2d) 833) and *National Labor Relations Board* v. *Federal Motor Truck Co.*, 146 Fed. (2d) 718, sought the enforcement of its Order before the Circuit Court of Appeals for the Sixth Circuit, directing the respective respondents to bargain collectively with the Unions theretofore determined to be the employees' bargaining agent of the plant protection employees. Both enforcement Orders were resisted by both of the employers even though the determination of the bargaining agent was made pursuant to the hearing held before the Board's Trial Examiners, and was based upon the result of elections held by the Board, in which elections the majority of the plant protection employees in each case selected the Unions as their exclusive bargaining agent. The Board issued its Order that the plant protection employees constituted appropriate units for the purpose of collective bargaining within the meaning of Section 9(a) and (b) of the National Labor Relations Act. The same court before which on appeal these petitioners' convictions were affirmed (Tr. 100), in examining the Board's petition for enforcement, had the following to say:

> "By sub-division (b) the duty of *determining the unit* of employees appropriate for the purpose of collective bargaining is *placed specifically and exclusively upon the Board.*" *Pittsburgh Plate Glass Co.* v. *Board*, 313 U.S. 146, 152. (Emphasis supplied.)

Paralleling the issues raised by the petitioners with the issues in the *Jones & Laughlin case, supra,* we submit that the duty of determining the nature of and assignment to work of national importance is placed specifically and exclusively upon the Director of Selective Service.

Further the Court stated,

> "But the Board's authority in making such determination is not an absolute one — it must be exercised within the permissible limits of administrative discretion, and whether it did so in these cases is the principal question for review."

Petitioners submit again on the basis of analogy that the *authority of the Director of Selective Service in making a determination as to what is and what is not work of national importance is not an absolute one—it must be exercised within the permissible limits of administrative discretion.* Petitioners ask that this Court review the question whether or not the Director proceeded within the permissible limits of administrative discretion.

In the *Jones and Laughlin case, supra,* it was concluded that,

> "In determining an appropriate unit for collective bargaining the Board is required by Section 9(b) to consider whether its Order will insure employees the full benefit of their rights to self-organization and collective bargaining, and this involves the inquiry . . . whether 'plant protection employees' are entitled to benefits of the Act . . ."

Petitioners submit that in determining the nature of and assignment to work of national importance, the Director of Selective Service is required by subsection (g) of Section 305 of said Selective Training and Service Act of 1940 to

consider whether such designation will assure to petitioners here the full benefit of the privilege granted to them by the Act by reason of their "religious training and belief." The Court in *Jones & Laughlin, supra,* cites *Pittsburgh Plate Glass Company* v. *Board,* 313 U. S. 146, in which case it was determined that the National Labor Relations Board has the exclusive duty to determine what is the appropriate unit for the purpose of collective bargaining. Notwithstanding of such a determination, the Circuit Court of Appeals stated that

> "Nevertheless, the Board could not stop with its finding upon the facts that plant protection employees are entitled to the benefit of collective bargaining. It is required under Section 9(b) to go farther and determine whether the unit or units selected for that purpose would effectuate 'the policies of Section 151-166 of this title . . .!' "

In line with the above, petitioners' claim that the Director of Selective Service could not stop with the finding upon the facts that the work to which he consigned petitioners was work of national importance. He is required, under Section 305(g) of the Selective Service Act of 1940, to go further and determine whether or not the work selected for the purpose indicated would effectuate the policy of the act involved; this because the Court, the decision of which in this case sought to be reviewed,—stated in the *Jones & Laughlin* case, *supra,* that

> " . . . respondents concede, as they must concede (*Pittsburgh P. Glass Co.* v. *Board, supra*) that the Board had wide discretion in determining whether the units selected were appropriate, and if so, whether their selection, effectuated the policies of the Act. But each respondent has insisted from the beginning and now insists, that in making such determinations the Board went clearly beyond the limits of its discretion. If this

is true, the orders are invalid as a matter of law. *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 113 Fed. (2d) 698, 701 (C.C.A. 8), affirmed 313 U. S. 146, 152 (4 Labor Cases, Para. 51, 122); *Midland Steel Products Co.* v. *N.L.R.B.*, 113 Fed. (2d) 800, 805, (C.C.A. 6)."

Petitioners say that just as above, so with respect to the issue raised by them, the Director of Selective Service had wide discretion in determining whether the work assignment given to petitioners was of national importance. However in making such determination, the Director went clearly beyond the limits of his discretion; and having done so, his determination is invalid, and in further consequence, petitioners' Demurrer to the indictments should have been sustained. In the *Jones & Laughlin* case, *supra,* the Court having examined the policies of the Act there involved, concluded that

> "In its administration the Board acts in a public capacity and in the public interest."

In the case at bar and the Act here involved, the fundamental purpose of that Act is to meet the needs of the declared national emergency; the raising of armed forces in accordance with a fair and just system, and, in consequence, its administration by the Director must be considered in a public capacity and in the public interest. As the Court said in the *Jones and Laughlin* case, *supra,* with reference to the Act there involved,

> "The Wagner Act is Federal legislation administered by the National agencies, intended to solve a National problem on a National scale",

any contrary

> " . . . contention, however, ignores the essential nature of the regulatory statutes of the class here considered, and the scope and purpose of administrative orders

made in exercise of powers conferred by such legislation. *They are to implement a public social or economic policy not primarily concerned with private rights, and through remedies not only unknown to the common law but often in derogation of it.*" (Emphasis supplied.)

Petitioners, following the reasoning of the Court above, submit that the Selective Service Act intended to implement a public social or economic policy, and acting to the contrary will negate the Congressional intent and will disregard the purposes of the Act.

With reference to the National Labor Relations Act, the Court said, in the *Jones & Laughlin* case, *supra*, that

> "In selecting appropriate units for collective bargaining, the duty of the Board to consider the public interest as a material factor is not different from that imposed upon it in the administration of any other feature of the Act. It must consider the public interest and may not delegate its authority in this respect." (Citing cases.)

Applying again the reasoning of the Court to the instant case, it appears obvious that in determining what is or what isnot work of national importance, the duty of the Director of Selective Service is to consider the public interest as a material factor. By doing so, one must be struck that the Drector in declaring that the assignment of petitioners to Cvilian Public Service Camp No. 135 at Germfask, Michigm, (in the Seeney Wild Life Reservation) is work of national importance is so completely out of line with any conception usually assigned to the phrase "work of national importance" that such declaration by the Director must be rejected. It must be rejected because the Circuit Court

of Appeals for the Sixth Circuit, in the *Jones & Laughlin* case, *supra*, stated that

> "The point here is (administering the National Labor Relations Act) not what the officers want, not what the men want, nor what the company either wants or is willing to acquiesce in, but what is in the public interest."

Carrying the analogy further, it is submitted that the point with reference to work of national importance under the Selective Training and Service Act of 1940 is not what the Director of Selective Service wants, not what the petitioners want, not what the administration of Civilian Public Service Camp No. 135 at Germfask wants, but the point is what is and what is not in public interest. It will be startling to find that petitioner Partridge, who has intimate acquaintantship with the countries of the Near East; who has first-hand knowledge of relief work necessary in periods of social upheavals as at the present, is assigned to a wild life refuge and not to relief of human beings because the Director of Selective Service pleased to designate the assignments in the wild life refuge "work of national importance". Petitioner Partridge, who is qualified to conduct relief work among displaced persons, is assigned to building fences, building bridges, making markers, and clearing pond cites and reservoirs. Petitioner Partridge, who speaks the languages of the Near East where the national interest of this country requires that we place able and competent administrators, is assigned to making fire breaks, to provide truck trails, and to seeding and sodding because the latter work, in preference to that for which petitioner Partridge is qualified, is designated by the Director of Selective Service as work of national importance. However, we submit that in doing so, the Director disregarded that according to congressional intent, the

work assignment was to be made, not to satisfy the whim of the Director, nor in a manner that will punish petitioner Partridge for his being a conscientious objector, but in a manner which takes cognizance truly of the national interest. This national interest was disregarded by the Director with reference to petitioner Partridge. It was disregarded with reference to petitioner Hopkins who was assigned to the same wild life refuge while the American Field Service was ready, willing and able to send him to the various battle fronts to drive an ambulance in the interest of the wounded of this country and of our Allies.

The national interest was completely disregarded with reference to the assignment of petitioner Horowitz. At the time when this country is greatly disturbed by the difficulties of finding a solution for the postwar period, when, in the expectation of everyone, serious unemployment threatens to disrupt the economic fabric of the Nation, a person of petitioner Horowitz' qualifications, with the experience that he gained in the Social Security Department of the Treasury Department of the United States, is called upon to cut paths through the underbrush of a wild game refuge just because the Director of Selective Service considers such work to be of national importance.

The Director disregarded the purpose of the Act and shunted away the true meaning of national interest when he made his determination as to the "work of national importance" to be assigned to petitioner Owen who is a graduate engineer, trained and experienced to perform work which is so greatly needed to be performed for the benefit of this Nation. However, the Director following a whim, and nothing more, found it in the national interest to assign petitioner Owen to the camp, there to make markers in preference to doing research work in connection with the manufacture of electrical equipment.

The Director of Selective Service, in everyone of the cases here involved, disregarded the national interest in determining and assigning petitioners to what the Director called work of national importance. To permit the Director so to proceed would be a departure from the determination of the Circuit Court of Appeals for the Sixth Circuit that an administrative agent's discretion is not absolute, but must be exercised in line with public interest and in accordance with national welfare. The Court in the *Jones & Laughlin* case, *supra*, concluded that

> "We think that in each order under review the Board failed to give adequate consideration to the National welfare and this is a fundamental error. In adopting the conclusions . . . the Board failed to give effect to the fact that from December 8, 1941 the country was at war, a fact which we judicially know . . ."

In line with the above reasoning, the petitioners submit that the Trial Court, and subsequently the Circuit Court of Appeal, when concluding that the determination by the Director of Selective Service cannot be reviewed, failed to give adequate consideration to the national welfare, and such failure is a fundamental error. The Trial Court, finding petitioners guilty and denying their Demurrer and Motions to Dismiss, and subsequently the Circuit Court of Appeal in upholding the Trial Court, failed to consider the fact that from December 8, 1941 on, this country was at war. Both Courts failed to consider that under wartime conditions certain work that may have been work of national importance in peacetime becomes unimportant and inconsequential.

Petitioners submit that a person who is able, because of his knowledge and training, to do general relief work in the Near East; that a person who is able to gather statisti-

cal data and apply them properly to problems of unemployment; that a person who is able and ready to drive ambulances on the war fronts, and persons who are assigned, in preference to the work for which they are trained, to a wild game refuge, are not assigned in the true meaning of the word and in the interest of the Nation to "work of national importance", because the Court in the *Jones & Laughlin* case, *supra*, said

> "The National welfare is of supreme importance and especially is this true in time of war . . . If these matters were given consideration by the Board, it was nowhere reflected in any of its orders or decisions . . . it nowhere finds that the bargaining units were selected in deference to the imperative public interest . . . The Board under Section 9(b) had a positive duty to perform in the interests of the public. It must be kept in mind that *in time of National peril, the preservation, protection and promotion of the National welfare is the paramount objective; and the Board must select bargaining agents with this in view.*" (Emphasis supplied.)

If it is true, and petitioners submit that it is, as the Court said above that the national welfare is of paramount importance at all times, and particularly in time of war, when considering the application of the National Labor Relations Act, so it is true that the national welfare must be considered by the Director of Selective Service in effectuating the Selective Training and Service Act of 1940, and in determining thereunder what is and what is not work of national importance. Because the National Labor Relations Board failed to observe that duty to the public, the Sixth Circuit Court of Appeals denied the Board's application to enforce its Orders. Petitioners relying on the decision of the Sixth Circuit Court of Appeals in the cases of *Jones & Laughlin* and the *Federal Motor Truck Company*,

supra, say that the Director of Selective Service, under the Act here involved, had a positive duty to perform in the interest of the public. He was duty-bound to keep in mind that in time of national peril, the preservation, protection, and promotion of the national welfare is the paramount objective. He must select work of national importance with that paramount objective in view. Petitioners submit that the Director of Selective Service utterly disregarded Congressional intent and acted contrary to the national interest when he assigned them not to work for which they were trained, to work that required particular skill, usable and necessary in the national interest, but to a kind of work that by no yardstick commonly accepted can be considered, either of consequence or of importance. In line with the decision of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case *supra*, (which opinion was quoted with approval by the Circuit Court of Appeals for the 7th Circuit in *National Labor Relations Board* v. *E. C. Atkinson Company*, 147 Fed. (2d) 730) petitioners's Demurrer and Motions to Dismiss were well taken and should have been allowed. The contrary ruling of the Trial Court which was permitted to stand on appeal was a grievous error. It is important that this Court, in the exercise of its supervisory powers, corrects the error so committed by the Courts below.

Petitioners submit that the first question here raised ought to be determined to hold that the courts below erred in that the Director of Selective Service is not authorized under the Act to arbitrarily designate the work to which he assigned petitioners as being of national importance. A natural corollary to the first question, if that should be determined against the petitioners, is whether or not the Act itself is unconstitutional in that it is incomplete and vague

to such an extent that under its certain powers may be assumed by the Director, which powers cannot be left to the discretion of an administrative agent. This Court so held in *A. L. A. Schechter Poultry Corp. et al.* v. *U. S.* 295 U. S. 495, 555, wherein the National Industrial Recovery Act of June 16, 1933, was held to be void because that Act attempted to delegate legislative authority to the administrative agent. Since the Selective Training and Service Act of 1940 is silent as to the details with reference to work of national importance, the Director can proceed only by assuming that he has the delegated power to make he determination himself. This, however, would be a delegation of legislative power which this Court held in the *A. L. A. Schechter Poultry Corp.* case *supra,* cannot be done. It was said,

> "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature cannot deal directly. We pointed out in the *Panama Refining Co.* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicability, which will enable it to perform its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

And then the Court further stated, the rule clearly applicable to petitioners' instant case, that

> "Sec. 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of facts determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, Sec. 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in Sect. 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President, in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code making authority thus confered is an unconstitutional delegation of legislative power."
>
> *A.L.A. Schechter Poultry Corp. et al.* v. *U. S.*, 295 U. S. 495, 555.

Petitioners submit that if legislative authority may not be delegated to regulate industrial codes, it surely cannot be delegated when it involves, as it does here, petitioners' constitutionally guaranteed right and the privilege that was granted to them by act of Congress that they may be exempt from military service because of their religious convictions, and that they be, in lieu of induction, assigned to work of national importance.

Wherefore petitioners pray that the writ of certiorari may issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding it to certify and send to this Court a transcript of the record and of all proceedings herein, and

that the judgment of conviction of the District Court for the Western District of Michigan, Southern Division, be reversed by this Court and for such other and further relief in the premises as this Court may deem just and proper.

Respectfully submitted,

ARDEN DIETRICH BODE, ALFRED EARNEST PARTRIDGE, JOHN KAYSER NEUBRAND, MORRIS HOROWITZ, GEORGE KIYOSHI YAMADA, JASON JEROME HOPKINS AND RODNEY CLAUD OWEN,
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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 596

ARDEN DIETRICH BODE, ALFRED EARNEST PARTRIDGE, JOHN KAYSER NEUBRAND, MORRIS HOROWITZ, GEORGE KIYOSHI YAMADA, JASON JEROME HOPKINS AND RODNEY CLAUD OWEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The seven petitioners were separately indicted in the District Court of the United States for the Western District of Michigan for violating Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. 311). In each case the indictment alleged that the defendant was lawfully assigned to Civilian Public Service Camp No. 135 at Germfask, Michigan, to do work of national importance and was duly enrolled as a member of the camp, and that he thereafter

left the camp without authority and did not return (see R. 1–2). Petitioners filed a demurrer to the indictments (R. 2–4) on the grounds that the Civilian Public Service Camp System is not authorized by the Selective Training and Service Act; that the powers delegated by the President to the Director of Selective Service are not conferred by the Act; that Congress lacked power to draft the defendants for work in Civilian Public Service Camps; that the Selective Service Regulations discriminate against conscientious objectors because they require such persons to perform work of national importance under civilian direction; and that Section 5 (g) of the Act is void because it fails to provide compensation or other benefits for persons assigned to Civilian Public Service Camps and because it fails to fix standards for determining what is work of national importance.

Petitioners admitted the facts pleaded in the indictments and pleaded nolo contendere, with the understanding that the pleas would not preclude their challenge to the legality of the Civilian Public Service Camp System (R. 6–7, 19-22). On March 28, 1945, the district court entered an order overruling the demurrer and denying their motion to dismiss the indictment (R. 90), and on April 2, 1945, the petitioners were each sentenced to imprisonment for a term of three years and six months (see R. 91; Pet. 4–5). Upon appeal

to the Circuit Court of Appeals for the Sixth Circuit, the judgments were affirmed, without opinion (R. 100).

In this Court, petitioners reassert their contentions that the system of Civilian Public Service Camps is violative of the Fifth and Thirteenth Amendments and that it was never authorized by Congress and they urge that, considering their particular skills, the work to which they were assigned was not, in their view, work of national importance. Assuming that these contentions are open to petitioners as matters of defense in these criminal prosecutions for deserting from the Civilian Public Service Camp, we submit that they are without merit. The very same arguments which petitioners make were unsuccessfully urged upon this Court in *Gormly* v. *United States,* No. 220, October Term, 1943, certiorari denied, 320 U. S. 753; *Roodenko* v. *United States,* No. 947, October Term, 1944, certiorari denied, 324 U. S. 860; *Kramer* v. *United States,* No. 1034, October Term, 1944, certiorari denied, 324 U. S. 878; *Brooks* v. *United States,* No. 1044, October Term, 1944, certiorari denied, 324 U. S. 878. In our briefs in opposition in those cases we have set forth the considerations which in our view demonstrate the unsoundness of petitioners' contentions. For the argument in support of our position the Court is respectfully referred to those briefs.

Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945